

DOL's Final Fiduciary Rules for Investment Advisors Apply to HSAs

On April 8, 2016, the DOL finalized its fiduciary regulations which, among other things, expand the definition of who is an ERISA fiduciary to those providing "investment advice" with respect to Health Savings Accounts (HSAs). As a result, the new guidance regarding what constitutes investment advice and the rules for best interest standards apply to HSAs in the same way in which they apply to IRAs, 401(k) and other retirement plans.

There is, however, exclusion for health insurance policies, disability insurance policies, term life insurance policies and similar assets that do not include an investment component from the final rule definition of "investment property."

Investment Advice

Under the final regulations, two types of advice will trigger fiduciary status when provided for a fee or other compensation: (1) recommendations to buy, sell, hold, or exchange securities or other investment property, or regarding how to invest securities or other property following a rollover, transfer, or distribution; and (2) recommendations on managing securities or other investment property, including investment policies, portfolio composition, selection of other persons as investment advisers or managers, selection of account type (e.g., brokerage versus advisory), or recommendations about rollovers, transfers, and distributions (including whether to make, amount, form, and destination).

The key aspect of this definition is whether or not a recommendation is made. According to the rule, a recommendation is a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the participant engage in or refrain from taking a particular course of action. The more specific and individually tailored the communication, the more likely the communication will be viewed as a recommendation and therefore fall under the provisions of the fiduciary rule.

The DOL listed three types of relationships that must exist for a recommendation to trigger fiduciary status. This includes both direct and indirect recommendations in exchange for a fee or other compensation. If a person:

- Represents or acknowledges that they are acting as a fiduciary within the meaning of ERISA or the Internal Revenue Code (Code);
- Renders advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or
- Directs the advice to a specific recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

The Best Interest Standard

The Best Interest Contract Exemption (BIC) provides relief for common compensation and fee structures, such as commissions, revenue sharing, and 12b-1 fees, so long as firms adhere to certain conditions that minimize conflicts of interest and provide advice that is in the best interest of their clients. BIC requires financial institutions to acknowledge that the firm and its advisors are fiduciaries and commit to an impartial conduct standard (i.e., prudent advice in the investor's best interest, no misleading statements, and reasonable compensation). For IRAs and HSAs, the advice must be provided under a written, binding contract.

The final regulations require a regularly updated website that contains information about the financial institution's business model; any associated conflicts of interest, a written description of the institution's policies to mitigate the conflict, and disclosure of any compensation and incentive arrangements with advisors or third parties.

Impact on Insurance Brokers

The Fiduciary Rules should have little impact, if any, on group insurance brokers who do not provide investment advice. As mentioned above, group insurance policies for health and welfare benefits with no investment components are excluded from the definition of "investment property" and a broker's involvement in helping an employer identify an HSA custodian will not rise to the level of investment advice as it relates to an HSA.

Effective Date

The final regulations are effective June 7, 2016, but most of the provisions do not apply until April 10, 2017.



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